No. 88-1993

IN THE

Supreme Court of the United States

October Term, 1988

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
Special Grand Jury,

Petitioners,

vs.

Michael Smith,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 26, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

TABLE OF CONTENTS

*The following items are contained in the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

MICHAEL SMITH,
Plaintiff,

vs. Case No. 87-143-Civ-FTM-17-B

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida,
and T. Edward Austin, Jr.,
as State Attorney assigned to the
Charlotte County Special Grand Jury,
Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Pursuant to Rule 12(a), Federal Rules of Civil Procedure, and Rule 3.01(a), Local Rules of the Middle District of Florida, the plaintiff, Michael Smith ("Smith"), by and through undersigned counsel, files this as his memorandum in opposition to defendants' motion to dismiss and their alternative request for entry of summary judgment.[1]

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1 Plaintiff incorporates by reference his lengthy memorandum in support of his request for preliminary injunction as additional grounds in opposition to defendants' motion.

MEMORANDUM OF LAW

Defendants' motion misstates plaintiff Smith's claim for relief. Defendants erroneously assert that Smith seeks in his complaint a declaration by this Court of an *absolute* right under the First Amendment. On the contrary, Smith's complaint fully recognizes and articulates that the First Amendment rights of free speech and press are *not* absolute rights. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979). Indeed, Smith premises his claim against Section 905.27, Florida Statutes (1985) ("Section 905.27") on the fact that its blanket prohibition on witness disclosure unconstitutionally fails to provide for the required balancing of interests; namely, his non-absolute First Amendment rights versus a narrowly-tailored, compelling state interest.

Far from asserting a right to speak with impunity about his testimony before the grand jury, Smith has requested this Court to refuse to permit Section 905.27 to silence him with impunity. As articulated in the complaint, the effect of Section 905.27 is to pose the equivalent of a prior restraint, a penal sanction, which absolutely, indiscriminately and permanently denies Smith his First Amendment rights. Section 905.27 accomplishes this sweeping strangulation with no regard for the requirement that where constitutional rights are threatened, as is clearly the case here, the least-restrictive means must be used to accomplish a narrowly-tailored compelling state interest.

The defendants, unable to justify this unconstitutional aspect of Section 905.27, instead distort Smith's claim for relief in an attempt to save an overbroad statute. Smith does not seek this declaration without regard to the legitimate goals of grand jury secrecy. Nor does he assert that Rule 6(e), Federal Rules of Criminal Procedure, ignores those concerns. Further, Smith does not ask this Court to overturn Section 905.27 as it applies to persons other than witnesses; namely, those expressly enumerated in the statute by virtue

of their voluntary roles as official participants in the proceedings. Rather, Smith simply argues and requests that this Court acknowledge that non-specific, general state concerns regarding grand jury secrecy do not justify the enforcement of Section 905.27 against him or any other grand jury witness.

Defendants incorrectly assert that equal protection considerations preclude a declaration that witnesses be excluded from the blanket secrecy provisions of 905.27. Witnesses are the only class of persons who are compelled before the grand jury under a subpoena; grand jurors, state attorneys and other participants are exposed to a wide range of witnesses and proceedings, as well as deliberations. Distinctions between their roles and the roles of mere witnesses can obviously be justified as rationally-based.

In attempting to preserve the witness disclosure prohibition in Section 905.27, defendants present cases which address Rule 6(e), Federal Rules of Civil Procedure, and its admonition against obliging witnesses to secrecy. *See e. g., In Re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282, 1285 n. 5 (S.D. Fla. 1974). Those cases correctly observe that in federal courts, the witness' right to disclose information concerning his testimony before the grand jury is not absolute, and that "[c]ircumstances may exist. . .which would justify some restrictions on disclosure by witnesses." *Id.* Defendants fail to note the elemental distinction between Smith's complaint against Section 905.27 and the considerations espoused by federal courts regarding 6(e), Federal Rules of Civil Procedure. Smith readily admits that in some circumstances a witness may justifiably be restricted from speaking in order to preserve secrecy in a particular case. Smith argues, therefore, not for a complete, absolute freedom of speech or press in this regard, but for the right to have those freedoms restricted only where necessary to

protect the compelling state interest as it would be articulated in those particular instances.

Finally, defendants apply inapposite precedent while incorrectly portraying the role of this Court in assessing the constitutionality of Section 905.27. Smith readily admits there is a lack of case law directly on point, and raised the issues in his complaint by analogy. However, absolutely nowhere in his complaint has Smith implied an absolute right to his First Amendment freedoms. Nor has he raised any claim of a higher right to those freedoms because he is a member of the press. Smith has not asked for special access to grand jury proceedings. Smith does not ask for a transcript of his testimony nor for any intrusion upon the secret deliberations of the grand jury process. It is entirely appropriate and in this case logically imperative that this Court examine Section 905.27 and declare its lack of a proper balancing of interests unconstitutional.

WHEREFORE, plaintiff Michael Smith respectfully requests this Court to deny defendants' Motion to Dismiss or Motion for Summary Judgment.

Respectfully submitted,

HOLLAND & KNIGHT

_____/s/_____

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to T. Edward Austin, Jr., 600 Duval County Courthouse, Jacksonville, Florida 32202, Robert A. Butterworth, Jr. and George L. Waas, The Capitol, Suite 1501, Tallahassee, Florida 32399, this 23rd day of December, 1987.

_____/s/_____

Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL SMITH

Plaintiff,

vs. CASE NO.: 87-143-Civ-FTM-17-B

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida,
and T. EDWARD AUSTIN, JR.,
as State Attorney assigned to the
Charlotte County Special Grand Jury,

Defendants.

SUPPLEMENT TO DEFENDANTS' MOTION TO DISMISS, AND MOTION FOR SUMMARY JUDGMENT

Defendants, by and through undersigned counsel, hereby supplement their Motion to Dismiss and Motion for Summary Judgment and supporting memorandum of law.

MEMORANDUM OF LAW

In an effort to establish an evidentiary record supporting plaintiff's claim under the First Amendment, he offers the testimony of two persons—Chris Hoyer and John Fitzgibbons. Fitzgibbons, who has never served as a state prosecutor in Florida, admits that he had to obtain a court order to prevent disclosure under Federal Rule 6(e) and concedes the effectiveness of obtaining from the court an order preventing disclosure by a witness (TR 11-12).

Hoyer also had to obtain a court order under Rule 6(e) to prevent witness disclosure (TR 18). Hoyer further recog-

nizes the differences between federal and Florida grand juries (TR 15, 19) and the problems resulting from a witness' discussion of his testimony under Rule 6(e) with the press (TR 17-18, 20-21). On the question of whether a compelling state need exists to make it unlawful for a witness before a Florida grand jury to disclose his testimony, Fitzgibbons said he did not think so (TR 12) and Hoyer said he was not competent to respond (TR 20).

The bottom line of their testimony at the December 30, 1987 hearing is that they either are aware of, or have experienced, problems with Rule 6(e). Their testimony hardly serves as evidentiary support for plaintiff's claim.

There may well be others who share the opinion of prosecutor Fitzgibbons; as the affidavit of Joseph D'Alessandro (Exhibit A) and depositions of Don Modesitt and Warren Goodwin exemplify, there are those who believe that the challenged statute is supported by compelling state interests.

There may be many federal and Florida statutes which officials and employees—public and private—believe are unnecessary, useless or ridiculous. What is important here, however, is that the opinion of one or two such persons, however well intentioned or deeply-rooted, does not and cannot serve as a basis for invalidating an act of the Legislature (or Congress) on constitutional grounds.

To this end, the opinion of Fitzgibbons has no bearing on the constitutionality of the challenged portion of § 905.27(1), Florida Statutes. The singular specter of invalidating any law on constitutional grounds on the opinion testimony of one or two persons serves as the strongest argument in opposition to such an approach.

In his closing argument, plaintiff essentially raises two points; the challenged provision's absolute bar to disclosure

(TR 29) and the distinction between plaintiff as a witness subpoenaed to testify and other persons listed in the statute's proscription whose activities are voluntary (TR-30).

On the absolute bar claim, plaintiff is bound by his own set of facts. He is seeking to publish information of very recent vintage; therefore, his claim of absolute prohibition is of no consequence here.

On plaintiff's attempt at a class distinction, nowhere is there any support for his claim that the First Amendment applies to him alone, and not to those other persons named in the statute.

This points out most graphically the problem of plaintiff's First Amendment claim. He seeks to limit First Amendment entitlement to his testimony only. This he cannot do, however, because he must accept the full thrust of his First Amendment argument as it applies to matters beyond his testimony and to those persons other than witnesses. Plaintiff cannot rely on the First Amendment and then, in self-serving fashion, attempt to limit its coverage.

Plaintiff places great reliance on *Worrell Newspapers of Indiana v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), saying this case is "almost directly on point" (TR 35). Not so. The statute in *Worrell Newspapers* has nothing to do with grand jury matters; the challenged statute here applies only to grand jury proceedings; the compelling state interest in *Worrell Newspapers* is the apprehension of criminals (739 F.2d at 1223); in this case, the compelling state interests in preserving the integrity of the Florida grand jury system are repeated again and again by the state's courts.

Therefore, *Worrell Newspapers* does not afford plaintiff any solace in his effort to graft the entitlement of Rule 6(e) onto § 905.27(1), Florida Statutes.

As Mr. Modesitt points out, there are differences between federal and Florida grand juries. This may explain why the federal policy choice under Rule 6(e) differs from Florida's policy.

What is of paramount importance in determining the constitutionality of the challenged statutory provision is the expressed will of the Legislature regarding the time-honored, traditional and historical veil of secrecy involving grand jury proceedings and the primacy of judicial supervision and control over these proceedings. On these issues, Florida's Legislature has spoken; § 905.27(1), Florida Statutes, recognizes the heightened importance of secrecy and the primacy of judicial supervision and control by providing that the *judiciary* may require disclosure under three distinct circumstances.

Just as secrecy and judicial supervision remain inviolate under Rule 6(e), so do these principles remain inviolate under § 905.27(1) Florida Statutes.

The attached records of the Florida Department of State show that the challenged language was enacted by the 1951 Legislature and has remained on the books since that time. (Exhibits B and C) In 1970, the Florida Legislature postured the statute in the manner as it presently reads. The records from the Florida Senate Judiciary-Criminal Committee (Exhibit D) establish that, although changes to the grand jury laws have been proposed over the years, none of those changes involves the language which is the subject of this court challenge. See pages 8, 16, 23 and 30 of Exhibit D, retaining the language originally enacted in 1951 and amended in 1970 by the Florida Legislature. What is important here is that nowhere is there a suggestion to alter or amend Florida Law so as to follow the federal experience under Rule 6(e).

In determining the constitutional validity of legislation, the courts consider only the power of the Legislature to enact the questioned law: the courts will not, and may not, intrude upon the policy, wisdom or necessity for the legislation. *See Hamilton v. State,* 366 So.2d 8 (Fla. 1978).

> Legislation cannot be declared unconstitutional unless that result is necessary in giving supremacy to the Constitution. Courts decline to enforce statutes only when to do so would violate organic law. They must give effect to a legislative act if it does not violate the constitution. If a statute does not violate the Federal or State Constitution, the legislative will is supreme and it is the duty of the court to effectuate the policy of the law as expressed in valid statutes.

10 Fla. Jur. 2d, Constitutional Law, § 57.

As previously demonstrated, § 905.27(1), Florida Statutes, reflects a policy choice by the Florida Legislature. In the setting of public policy, the Legislature is supreme and its powers plenary, limited only by the express and clearly implied provisions of the Federal and Florida constitutions. 10 Fla. Jur. 2d, Constitutional Law, § 145 - 147.

Section 905.27(1), Florida Statutes, has served the State of Florida for over 36 years and plaintiff has offered no evidence whatsoever that the challenged language is in violation of the First Amendment. Defendants urge that plaintiff cannot do this because the First Amendment is not implicated in plaintiff's claim. In this light, any balancing test which plaintiff urges has already been accomplished by the Florida Legislature. The Legislature has balanced the interests involving grand jury proceedings and has opted for a strong approach to those principles permeating the grand jury system: secrecy of proceedings and primacy of judicial supervision and control.

WHEREFORE, the defendants reassert their Motions to Dismiss and for Summary Judgment.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/S/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GREGG D. THOMAS, LAURA WHITESIDE, and LORA J. SMELTZLY, Post Office Box 1288, Tampa, Florida 33601, this 15 day of January, 1988.

_____/s/_____ _____

GEORGE L. WAAS
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Appendix for Petitioners was served in accordance with Rule 28-1 of the Rules of the Supreme Court of the United States by depositing three copies in a United States Post Office or mailbox, with first-class postage prepaid, addressed to:

Gregg D. Thomas
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Tampa, Florida 33601

_____/s/_____

GEORGE L. WAAS
Assistant Attorney General